

No. 84187-0

SUPREME COURT OF THE STATE OF WASHINGTON

KITTITAS COUNTY CONSERVATION, RIDGE, FUTUREWISE,

Petitioners,

KITTITAS COUNTY,

Respondent,

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW),
(CWHBA), MITCHELL WILLIAMS, d/b/a/ MF WILLIAMS
CONSTRUCTION CO., TEANAWAY RIDGE, LLC, KITTITAS
COUNTY FARM BUREAU,

Intervenors,

ART SINCLAIR and BASIL SINCLAIR,

Petitioners.

CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION, et al.,

Petitioners,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, et al.
Respondent.

CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION, a
Washington not-for-profit corporation; BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON, a Washington not-for-profit
corporation; and MITCHELL WILLIAMS, d/b/a/ MF WILLIAMS
CONSTRUCTION CO., INC.,

Petitioners/Intervenors,

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v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, KITTITAS COUNTY CONSERVATION COALITION,
RIDGE AND FUTUREWISE,

Respondents,

and

KITTITAS COUNTY, a Washington municipal corporation,

Respondents.

KITTITAS COUNTY, a political subdivision of the State of Washington,
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW),
(CWHBA), MITCHELL WILLIAMS, d/b/a/ MF WILLIAMS
CONSTRUCTION CO., TEANAWAY RIDGE, LLC, KITTITAS
COUNTY FARM BUREAU, and SON VIDA II,

Petitioners,

v.

KITTITAS COUNTY CONSERVATION, RIDGE, FUTUREWISE, and
EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD,

Respondents,

**KITTITAS COUNTY FARM BUREAU'S BRIEF IN RESPONSE TO
THE DEPARTMENT OF ECOLOGY'S *AMICUS CURIAE* BRIEF**

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I. INTRODUCTION

The Washington State Department of Ecology ("Ecology"), in its *Amicus Curiae* brief, asks the Court to segregate an issue from this comprehensive and complex Growth Management Appeal and use that narrow issue to broadly re-write Washington Land Use and Water Law. The Court should decline Ecology's request and conclude Kittitas County's Development Regulations are GMA compliant.

II. DISCUSSION

2.1 Background

The Kittitas County Farm Bureau ("Farm Bureau") intervened in Case No. 07-0015 before the Growth Management Hearings Board for Eastern Washington.¹ In the Development Regulations Case before the Growth Management Hearings Board for Eastern Washington ("Board"), the Board identified Issue 4 as follows:

Does Kittitas County's failure to require that all land with a common ownership scheme of development be included in one application for division of land, KCC 1604 violate RCW 36.70A.020 (6)(8)(10)(12), RCW 36.70A.040, RCW 36.70A.060, RCW

¹ There are two pending cases involving Kittitas County's attempt to comply with the Growth Management Act (GMA). One, which is under Cause No. 26547-1, is referred to as the "Comprehensive Plan Case," arises from an appeal by Kittitas County Conservation, Ridge and Futurewise, of Kittitas County's adoption of its existing comprehensive plan update. The second case, which is under Cause No. 27123-4-III, is referred to as the "Development Regulations Case," challenges Kittitas County's adoption of Ordinance 2007-22. In Ordinance 2007-22, Kittitas County, after updating its Comprehensive Plan, adopted development regulations to implement that Comprehensive Plan. The Kittitas County Farm Bureau has intervened in both cases.

36.70A.070, RCW 36.70A.130 and RCW
36.70A.177.²

The Board looked at the issue of whether Kittitas County's Subdivision Code allowed property owners to divide subdivision applications amongst more than one application, even if all the property is part of one development. Kittitas County Conservation, Ridge and Futurewise argued that without development regulations to prevent this type of development, the development regulations violated the Growth Management Act (GMA) mandate to preserve water quality and protect water resources.³ The Board analyzed the issue and, in its analysis, made several erroneous legal conclusions which Ecology now seeks to seize on in order to impose another layer of water regulation on water right holders within the State of Washington, including those members of the Farm Bureau who own, use and rely on water rights for their economic livelihood.

Specifically, the Board found that:

...although DOE is the ultimate authority on just how a permit for an exempt well is obtained, the County still controls its own ground/surface water and the GMA requires protection of these resources. Given these roles within water resource management, the County's development regulations are important in that they can limit the impact

² Administrative Record ("AR"), pp. 1229-1234.

³ AR, p. 1230.

on water resources by requiring a developer seeking application approval to demonstrate that the proposed development will not adversely impact ground/surface waters. Simply stating the DOE exempts the well does not remove the responsibility of the County to protect water quality and quantity as required by the GMA.⁴ (Emphasis added).

The Board was incorrect in its findings because Ecology is not the ultimate authority on how a permit for an “exempt well” is obtained. RCW 90.44.050 exempts certain withdrawals of ground water from permit requirements before the withdrawal is made. One of the exemptions is for single or group domestic supply in an amount not exceeding 5,000 gallons per day.⁵ The Board was incorrect on the very basics of the permit exemptions. The term “exempt well” is a misnomer because it is the withdrawal of ground water that is exempt from the necessity of obtaining a permit if the withdrawal is for single or group domestic supply in an amount not exceeding 5,000 gallons per day. Once the withdrawal is made and the water is beneficially used for single or group domestic supply in an amount not exceeding 5,000 gallons per day, then a water right is established and that water right is subject to regulation by Ecology

⁴ AR, p. 1233.

⁵ RCW 90.44.050; see also *Department of Ecology vs. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P. 3d 4 (2002).

just as any other water right established through the permit process.⁶ Thus, contrary to the premise the Board used to make its ruling, an exempt withdrawal becomes a water right based on beneficial use by the appropriator of water, not by the action or inaction of Kittitas County or Ecology.

2.2 The Eastern Washington Growth Management Hearings Board does not have jurisdiction to order Kittitas County to adopt development regulations which regulate the use of water rights.

The Board determined it had jurisdiction to address water issues based upon RCW 36.70A.020(10) and RCW 36.70A.070(5)(c)(iv).⁷ The Department of Ecology asserts the Board has jurisdiction to order Kittitas County to adopt development regulations that control an individual land owner's use of water.⁸ Ecology relies, as the Board did in its decision, on RCW 36.70A.020(10). RCW 36.70A.020 articulates the GMA planning goals and, specific to goal 10, this statute provides as follows:

“The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the

⁶ RCW 90.44.050; *Campbell & Gwinn LLC* at 4.

⁷ AR, p. 1232.

⁸ Ecology Brief, p. 5.

development of comprehensive plans and development regulations: ...

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water."⁹

This is an articulation of a goal. It does not confer upon the Board the authority to order Kittitas County to make regulations which regulate how one obtains a right to use surface or ground water in the State of Washington.

Ecology and the Board also erroneously rely on RCW 36.70A.070(5)(c)(iv). RCW 36.70A.070 specifies what a comprehensive plan must contain and does not deal with development regulations. RCW 36.70A.070(5) specifies a comprehensive plan must have a rural element.¹⁰ RCW 36.70A.070(5) further specifies the rural element of the comprehensive plan must include measures that apply to rural development including protecting critical areas, as well as surface and ground water resources. The statute relates to comprehensive plans and does not require Kittitas County to adopt development regulations to regulate how one obtains a water right and how one uses the water right.

While ensuring development regulations meet the GMA goals, there is no indication that the legislature intended to confer on a local

⁹ RCW 36.70A.020

jurisdiction the authority to determine when, under what circumstances and how individuals could use water rights.

2.3 State law precludes Kittitas County from regulating water use.

The authority to regulate water rights and use rests exclusively with the Washington State Department of Ecology.¹¹ In Washington, the Department of Ecology has not only the authority, but the obligation, to regulate all surface water and ground water uses under Chapter 90.03 and Chapter 90.44 RCW. Under RCW 43.21A.064, the Department of Ecology, through its director, is obligated to supervise the appropriation, diversion and use of public waters within the state.¹² Ecology also regulates and controls the diversion of water in accordance with the rights thereto and shall determine the discharge of streams and springs and other sources of water supply and the capacities of lakes and reservoirs whose waters may be used for beneficial purposes.¹³

Ecology has the authority to determine when and under what circumstances an individual has the right to use waters of the state.¹⁴ The one exception to this is, as discussed above, certain withdrawals of ground water are exempt from the need to have the Department of Ecology issue a

¹⁰ RCW 36.70A.070 (5).

¹¹ Chapter 43.21A RCW.

¹² RCW 43.21A.064 (1).

¹³ RCW 43.21A.064(3) and (4).

permit.¹⁵ However, once the water has been withdrawn and put to beneficial use, those waters are considered a water right.¹⁶

Once the water right exists, regardless of whether it is created through the RCW 90.44.050 exemptions or not, is subject to regulation by the Department of Ecology. These regulations include regulating competing uses of water, regulating water use under the doctrine of "First in Time First in Right,"¹⁷ regulations relating to determining when and under what circumstances a water right will be changed¹⁸, regulations designed to require individuals to register their water use with the State of Washington and giving Ecology the authority to relinquish water rights when they go unused for five years without a lawful excuse.¹⁹ No portion of the water rights regulating scheme allows any other agency or jurisdiction to regulate the acquisition and use of water rights.

Kittitas County must follow state subdivision law with respect to how it goes about allowing the subdivision of land. In addition, Kittitas County has adopted a State Environmental Policy Act (SEPA) process.²⁰

¹⁴ RCW 90.03.010 and RCW 90.44.050.

¹⁵ RCW 90.44.050.

¹⁶ RCW 90.44.050; *Campbell & Gwinn* at 9.

¹⁷ *Campbell & Gwinn* at 9.

¹⁸ RCW 90.03.380

¹⁹ Chapter 90.14 RCW.

²⁰ The County's SEPA process is set forth at Kittitas County Code, Chapter 15.04.

When an applicant in Kittitas County files an application to subdivide land, the County processes that application consistent with the county subdivision code and state subdivision law. Part of that process requires an analysis under SEPA. The State Subdivision Code and SEPA provide different tools for the adequate protection and regulation of water resources during development. Thus, the name on the application is not relevant to the County's role. Instead, what matters is the cumulative impact of the development and/or adjoining developments.

Ecology, in its brief, asserts it has four interests in the outcome of this case. Ecology's first articulated interest in the case is whether Kittitas County can take action under the GMA that may affect uses of water and exercises of water rights or whether state law precludes such actions.²¹ Secondly, Ecology "seeks to ensure that the County's development regulations include provisions that will enable the proper management of water resources in the county."²² These two issues are of specific importance and concern to the Farm Bureau because the law does not allow a "two-tiered" system of regulation of water uses in this state. A result of the arguments advanced by Ecology is Ecology's existing regulating scheme would exist with respect to obtaining the right to use

²¹ Ecology Brief, p. 3.

²² Ecology Brief, p. 3.

water and the actual use of water in the State of Washington. However, the County, under Ecology's theory, could also adopt a second tier of rules and regulations relating to obtaining the right to use water and the use of water. The two levels of regulation will amount to an unnecessary burden on existing water right holders.

As long as Kittitas County has adopted subdivision regulations that are consistent with state law and applies those subdivision regulations in conjunction with the State Environmental Policy Act, then Kittitas County has met its obligations under State Subdivision Law and under the Growth Management Act.

Ecology also cites to RCW 58.17.110 requiring local governments to determine whether subdivision applicants have made appropriate provisions for potable water supply and RCW 19.27.097 which requires local governments to determine if an applicant provides evidence of adequate water supply for the intended use. Kittitas County must comply with the two statutes cited by Ecology but, contrary to Ecology's assertions, Kittitas County is not in a position to "consider water resource laws and facts as administered by Ecology, such as reviewing what water rights statements of claims, permits and certificates are held by the applicant and what water use is authorized under those rights to determine

if there is adequate water for the proposal.”²³ While Ecology may have concerns about individuals “daisy chaining”²⁴ exempt withdrawals together to avoid the 5,000 gallon per day withdrawal limit, Ecology’s assertion that it is Kittitas County’s obligation to review water right claims, permits and certificates to determine if there is adequate water for the proposal would not address that issue and would result in two agencies undertaking the same role with a different set of regulations, again, resulting in a two-tiered overlapping and potentially conflicting water regulations scheme that may, and ultimately will, have a detrimental impact on existing water right holders, including those members of the Farm Bureau who own and rely on water rights.

III. CONCLUSION

The Farm Bureau does not dispute that the GMA includes provisions requiring a county to address water resources in its comprehensive plan and development regulations. Those statutes, however, do not extend the authority to the County to regulate how one can acquire the right to use water and how one actually uses the water.

The position of Ecology and the Board, in their efforts to ensure the Kittitas County Development Code includes a proviso that common

²³ Ecology’s Brief, p. 11.

²⁴ Ecology’s Brief, pp. 6-7.

ownership must be disclosed, would result in opening the door to multiple jurisdictions regulating the same water rights, to the detriment of existing water right holders. The Farm Bureau believes there are sufficient existing tools available to Kittitas County, including State Subdivision Code and SEPA, to ensure water resources are adequately protected and regulated during development. Because of these existing tools, it is not necessary to authorize growth boards to review and Kittitas County to ultimately enact development regulations which regulate the acquisition and use of water rights and could result in burdens and conflicting regulations.

RESPECTFULLY SUBMITTED this 3 day of March, 2010.



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CERTIFICATE OF SERVICE


I certify that I have this day caused the document to which this is attached to be served on the individuals listed below and in the manner noted below:

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I certify, or declare, under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Ellensburg, Washington this 3rd day of March, 2010.


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